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# **In the Supreme Court of the United States**

OCTOBER TERM, 1945

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No. 563

VALENTINE & SONS, A COPARTNERSHIP, A. L. RUSSO  
& Co., GEORGE COPRIVIZA & SON, COX & WAUGA-  
MAN, PAPAC-NIRICH COMPANY AND MATIAS-  
VICH BROS., PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES EMERGENCY COURT OF APPEALS

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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## **OPINION BELOW**

The opinion of the United States Emergency Court of Appeals (R. 212-215) has not yet been reported.

## **JURISDICTION**

The judgment of the United States Emergency Court of Appeals was entered September 26, 1945. On October 26, 1945, the Chief Justice entered an order extending the time for the filing of a petition for certiorari "to and including November 5th, 1945,

provided that power exists to extend such time under the applicable statutes" (R. 217). The petition for a writ of certiorari was filed October 27, 1945. Jurisdiction of this Court is invoked under section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. (Supp. IV), Sec. 924 (d) (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code as amended (28 U. S. C. 347).

#### QUESTIONS PRESENTED

1. Whether this Court has power to entertain a petition for a writ of certiorari to the Emergency Court of Appeals filed more than thirty days after the entry of judgment by that court.
2. Whether the Price Administrator was arbitrary or capricious in denying to petitioners a retroactive increase in their maximum prices for the seasonal service of drying apples in excess of the retroactive price increase which the Office of Price Administration had previously granted on its own initiative.

#### STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 and of the Judicial Code appear in the Appendix, *infra* pp. 15-16. The maximum price regulation involved appears in the Federal Register (7 F. R. 6428). The provision thereof relating to individual price adjustments is set forth

at page 10, *infra*. The general order issued by the Regional Administrator, under the regulation, appears at page 44 of the Record.

#### STATEMENT

The opinion of the court below contains a clear and concise statement of the relevant facts in this case. The following excerpts from that opinion set forth all the essential facts (R. 212-214):

Commercial apple drying services were first, on April 28, 1942, brought under price regulation by the General Maximum Price Regulation (7 F. R. 3153), which fixed the permissible prices for such services at their March, 1942, levels. On August 13, 1942, prior to the commencement of the 1942 apple drying season, such services were placed under § 103 (b) of Maximum Price Regulation 165, as amended (7 F. R. 6428). After the close of the 1942 apple drying season, on April 1, 1943, acting under the adjustment provision of Maximum Price Regulation 165, the Regional Administrator for Region VIII on his own initiative issued Order No. G-2 which retroactively adjusted upwards the maximum price set by Maximum Price Regulation 165 for all commercial drying services rendered upon apples sold to any agency of the United States government by persons located in California. Substantially all of the 1942 apple crop had been sold to the United States government. \* \* \*

\* \* \* Acting under § 114 (d) [pro-

viding for individual price adjustments under stated circumstances], the complainants, six commercial apple dryers from the Watsonville drying area in California, filed, on July 22, 1943, a joint application for adjustment. At the time of application the provisions of Order No. G-2 determined the charges which these complainants could lawfully receive for their drying services during the 1942 season. What complainants sought in this application was, in effect, a further retroactive increase in the maximum charges for apple drying in the 1942 season beyond what had already been given them under Order No. G-2.

The application for adjustment was denied by the Acting Regional Administrator on August 24, 1943. \* \* \* Shortly thereafter, the complainants posted notices announcing that no apples would be accepted for commercial drying in the 1943 season.

On September 10, 1943, the complainants sought review of the Acting Regional Administrator's order denying their application for adjustment. On March 27, 1944, the Acting Price Administrator denied, on review, the application for adjustment.

The complainants filed, on May 25, 1944, a protest directed against Order No. G-2 and the Administrator's order of March 27, 1944. The protest was denied by the Administrator on June 29, 1944. On July 27, 1944, a complaint was filed with this court [Emergency Court of Appeals] and, pursuant to an order of the court, the protest proceedings were

reopened for the presentation of further evidence. Such additional evidence was filed in the reopened proceeding, and on February 20, 1945, the Administrator issued an order denying the protest upon reconsideration.

On September 26, 1945, the Emergency Court of Appeals dismissed the complaint on the ground that it had not been shown that the Price Administrator's action in denying petitioners' application for a retroactive adjustment of their maximum prices in excess of that theretofore granted was arbitrary or capricious or otherwise improper under section 114 (d) of Maximum Price Regulations No. 165—as amended, Services. (R. 212-216.)

On October 26, 1945, Mr. Chief Justice Stone issued an order "Upon consideration of the application of counsel for the petitioners," extending the time within which a petition for certiorari might be filed, "provided that power exists to extend such time under the applicable statutes." (R. 217.) The petition for a writ of certiorari was filed on October 27, 1945.

#### ARGUMENT

In extending the time within which a petition for certiorari might be filed herein, this Court expressly left open the question of its power so to extend the time. The judgment of the court below was entered on September 26, 1945. The thirty-day period provided in Section 204 (d) of the Act for the filing of a petition for certiorari expired

on Friday, October 26. On the latter date the provisional order extending time was entered. Not until the following day, October 27, was the petition filed. It is our view that under the applicable statutes there is no authority to extend the time for filing a petition to review a judgment of the Emergency Court of Appeals, and that therefore the present petition was not timely filed.

Section 204 (d) of the Act, under which jurisdiction of this Court is invoked, provides, in part:

Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347) \* \* \*

Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Authority to extend the thirty-day period provided in Section 204 (d) must, of course, be found in an applicable statute. Section 204 (d) makes reference to Section 240 of the Judicial Code, as amended, but does so only by way of providing that after a petition for certiorari is filed under the thirty-day time limit, "thereupon" the judgment is to be subject to review by this Court in the same manner as a judgment of a circuit court of appeals. Even if the reference to Section 240 of the Judicial Code were more inclusive, the petitioner would not be aided. Section 240 of the Judicial Code contains no provision concerning the time for filing petitions for certiorari. The matter of time is covered by Section 8 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 28 U. S. C. 350. That section provides:

SEC. 8. (a) That no writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Phillippine Islands may be granted where application therefor is made within six months: *Provided*, That for good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court.

It is evident that the foregoing provision for extension of time is made applicable only to the cases governed by the limitations of three months and, with respect to the Supreme Court of the Philippine Islands, six months. It follows, we believe, that the question as it relates to the Emergency Court of Appeals must be assimilated to the practice with respect to appeals (as distinguished from petitions for certiorari) from state courts, which are not embraced by the proviso to Section 8 (a) of the 1925 Act, and petitions for certiorari to review judgments in criminal cases, which are governed by the Criminal Appeals Rules pursuant to special act of Congress. In neither of these types of cases does authority exist for the extension of time within which to bring a case to this Court. Cf. *United States ex rel. Coy v. United States*, 316 U. S. 342; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, pp. 718, 777.

The conclusion thus to be drawn from the text of the applicable statutes is supported also by the obvious purpose of the thirty-day period prescribed in Section 204 (d) of the Emergency Price Control Act. In addition to the shortened period for filing petitions, that section provides that "the Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection." More-

over, Section 204 (b) postpones the effectiveness of a judgment of the Emergency Court setting aside a price regulation, "until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court." This appears to be a further recognition of the limitation of thirty days placed upon the time within which certiorari may be applied for.<sup>1</sup>

It is therefore submitted that the present petition must be denied as not having been filed within the time provided by law.

(2) The only substantive question which can be presented in this proceeding is whether the Price Administrator acted arbitrarily and capriciously in denying petitioners' application under section 114 (d) of Maximum Price Regulation No. 165, as amended, for a retroactive adjustment of their maximum prices for apple drying services performed in the 1942 season. This section pro-

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<sup>1</sup> While the legislative history of the Act does not deal with the specific problem, it reflects the concern of Congress for expedition in the review of judgments of the Emergency Court of Appeals. Cf. Report of the Senate Committee on Banking and Currency to accompany H. R. 5990, S. Rep. No. 931, 77th Cong., 2d Sess., p. 24; Report of the House Committee on Banking and Currency to accompany H. R. 5990, H. Rep. No. 1409, 77th Cong., 1st Sess., p. 12.

vided<sup>2</sup> for individual price adjustments to persons subject to the regulation who showed:

(1) That there exists or threatens to exist in a particular locality a shortage in the supply of a service which aids directly in the war program or is essential to a standard of living consistent with the prosecution of the war; and

(2) That such local shortage will be substantially reduced or eliminated by adjusting the maximum prices of such seller and of like sellers for such service; and

(3) That such adjustment will not create or tend to create a shortage or a need for increase in prices, in another locality, and will effectuate the purposes of the Emergency Price Control Act of 1942, as amended.

Maximum prices for the services in question originally came under control with the issuance of the General Maximum Price Regulation. Prior to the commencement of the 1942 season this regulation, so far as the maximum prices of apple drying services are concerned, was superseded by Maximum Price Regulation No. 165, as amended—Services. Petitioners filed no application for adjustment, although the regulation made express provision therefor and set forth the method of filing such an application. Not until

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<sup>2</sup> This regulation was revised and reissued as Revised Maximum Price Regulation No. 165 on July 1, 1944, effective August 1, 1944 (9 F. R. 7439).

after the Regional Administrator, who was authorized to take action under the regulation, had, on his own initiative, granted an adjustment of maximum prices for the 1942 season, after the close of that season, did petitioners seek any price relief.

Individual adjustments can be granted only within the terms of regulatory provisions of general applicability making provision therefor. (See Section 2 (c) of the Act.) Although this regulation, like most maximum price regulations providing for adjustment of maximum prices on the application of a person subject thereto, does not expressly provide for retroactive adjustments, the Administrator has consistently taken the position that such action can and will be taken when necessary to effectuate the purposes of the adjustment provision. Clearly, however, such instances will be very limited in number. Where, as in the present case, maximum prices in effect prospectively are adequate to assure continued supply, retroactive increases will be granted only when it appears that the applicant will be unable to remain in operation unless he is permitted at the present time to collect additional amounts of money in connection with past transactions. In short, unless the applicant's financial structure is so impaired as clearly to indicate that, for financial reasons, it cannot continue in business, retroactive individual adjustment of maximum

prices will be denied. It is submitted that the court below was manifestly correct in holding that this administrative standard is reasonable (R. 214-215).

The record in this case is entirely lacking in any evidence tending to show that a retroactive adjustment of petitioners' maximum prices was required to effectuate the purposes of the adjustment provision of the regulation. It is submitted that the opinion of the court below is clearly correct, and that no extended argument is required on our part.

(3) This case presents no question of general importance or applicability. Petitioners have listed thirteen separate "objections" to the Administrator's action. These objections are, in general, repetitions of those presented to the Administrator, concerning which the court below remarked:

The complainants in their protest set forth 26 objections. Upon analysis of the situation as presented to this court, however, the issue properly before us is found to be very narrow.

We have only to determine whether the complainants have shown, under the requirements of the adjustment provision (§ 114 (d) of MPR 165, as amended), that it was arbitrary or capricious for the Price Administrator to refuse to grant the application for a further retroactive increase in the permissible service charges for the 1942 apple drying season (R. 214).

It thus appears that the sole issue presented is a narrow factual one, with no substantial question of federal law involved.

To be sure, in their protest (R. 2-4), in their complaint (R. 179-180) in the court below and in their petition for a writ of certiorari, petitioners have sought to raise broad issues of constitutional and statutory validity of the Administrator's action in this case. As properly observed by the court below (R. 214), such objections would be available only by way of protest against Maximum Price Regulation No. 165, and no such protest was filed by petitioners. It may further be pointed out, however, that at no time have petitioners sought to make specific or to support by evidence any of their general objections to the Price Administrator's action. There is no slightest evidence that Maximum Price Regulation No. 165 is generally unfair and inequitable or otherwise invalid. It further clearly appears that the administrative procedure followed by the Office of Price Administration was entirely proper within the terms of the Act. The statutory procedure is fully in accord with constitutional requirements of procedural due process. *Yakus v. United States*, 321 U. S. 414

#### CONCLUSION

The petition for a writ of certiorari should be denied as not filed within the time prescribed by

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law. In any event the decision below is correct and does not warrant further review.

Respectfully submitted.

J. HOWARD McGRATH,  
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RICHARD H. FIELD,  
*General Counsel,*  
*Office of Price Administration.*

DECEMBER 1945.

